

No. 756

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**In the Supreme Court of the United States**

OCTOBER TERM, 1942

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FRANK ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## **OPINION BELOW**

The majority (R. 20-22) and dissenting (R. 22-24) opinions in the Circuit Court of Appeals are reported at 131 F. (2d) 392.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on November 24, 1942 (R. 24), and a petition for rehearing denied January 16, 1943 (R. 27). The petition for a writ of certiorari was filed February 20, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

#### QUESTION PRESENTED

Petitioner was given a general sentence of a fine of \$250 and imprisonment for two years. He was placed on probation as to the prison sentence provided he pay the fine. He paid the fine but later he violated the terms of his probation, probation was revoked, and he was sentenced to imprisonment for three years. The question presented is whether the Probation Act authorizes this sentence and, if so, whether, in violation of the Fifth Amendment, double punishment results.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in part as follows:

\* \* \* nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. \* \* \*

The pertinent provisions of Sections 1 and 2 of the Probation Act (Act of March 4, 1925, c. 521, 43 Stat. 1259 et seq., as amended by the Act of June 16, 1933, 48 Stat. 256, 18 U. S. C. 724, 725) are:

SEC. 1. The courts of the United States having original jurisdiction of criminal actions, \* \* \* shall have power, after conviction or after a plea of guilty or nolo

contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. \* \* \* the period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

#### SEC. 2. \* \* \*

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest \* \* \*. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a war-

rant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

#### STATEMENT

Petitioner pleaded guilty in the District Court for the Northern District of Alabama on April 25, 1938, to a two-count indictment charging him and two others with violating the Act of February 13, 1913, as amended (18 U. S. C. 409), by stealing cigarettes and tobacco from an interstate shipment of freight and receiving and having the stolen cigarettes in their possession, knowing them to have been stolen (R. 2-5). On April 26, 1938, the court sentenced petitioner generally to serve 2 years' imprisonment and to pay a fine of \$250, the petitioner to stand committed on May 25, 1938, but the judgment provided that "said prison sentence imposed be suspended and defendant placed on probation for a period of Five (5) Years, conditioned upon defendant paying the fine imposed" (R. 5-6). The fine was evidently paid before the commitment date since the prison sentence was suspended and petitioner was placed on probation (R. 8; Pet. 2).

On June 19, 1942, petitioner was brought before the court charged with violating the terms of his probation. Finding that he had in fact violated

his probation, the court entered a judgment revoking petitioner's probation, setting aside the "sentence heretofore suspended" and sentencing petitioner to imprisonment for a period of 3 years, 1 year more than the punishment originally imposed (R. 8-9). The judgment was affirmed on appeal, one judge dissenting (R. 20-24).

#### ARGUMENT

It would now seem beyond doubt that, when a sentence of imprisonment alone is imposed but its execution is suspended and probation granted, the court may, upon revocation of probation, sentence to a greater term of imprisonment than that originally given without its action constituting double punishment. *United States v. Moore*, 101 F. (2d) 56 (C. C. A. 2), certiorari denied, 306 U. S. 664.<sup>1</sup> See also *Remer v. Regan*, 104 F. (2d)

<sup>1</sup> In this case Moore had been sentenced to two years' imprisonment but execution of the sentence had been suspended and Moore granted probation. Mr. Justice Van Devanter, then retired but sitting as a United States District Judge, later revoked probation because of its violation and sentenced Moore to seven years' imprisonment and a fine of \$300. While the opinion of the circuit court of appeals did not specifically discuss Mr. Justice Van Devanter's power to increase the term of imprisonment, the question was a fundamental one, appearing upon the face of the record, and was argued in both the petition for writ of certiorari (pp. 7-8, 13-17) and the Government's brief in reply (pp. 10-12). In its reply brief the Government pointed out that Section 2 of the Probation Act expressly provides that "the court may revoke probation or the suspension of sentence, and may impose any sentence which might originally have been imposed".



704, 705-106 (C. C. A. 9), certiorari denied, 308 U. S. 553. Petitioner apparently does not question such power (Pet. 13). He contends, however, that when, as here, a fine is also imposed at the time the prison sentence is suspended and probation granted, the payment of the fine is a partial execution of the sentence<sup>2</sup> and

(italics supplied): that the effect of the provisions of Section 2 is to extend the term during which a district court, for the purpose of the Probation Act, has control over its judgment; and that since the petitioner in the case at bar had not satisfied or executed even in part the prior sentence while on probation, probation not being imprisonment or punishment, an increase in the sentence, upon revocation, did not constitute double punishment.

Petitioner asserts at one point in his petition that he also executed part of the prison sentence by "standing committed" for one day (Pet. 19). He seems to imply that an order formally suspending the prison sentence was entered on May 26, 1938, the day after the commitment date contained in the original judgment (see Pet. 18; R. 6), but no such order is contained in the record. At every other place in his petition petitioner asserts only that he paid his fine (Pet. 2, 4, 5, 12-17) and his argument is predicated almost in its entirety upon that fact alone. Indeed, in one place in his petition he states that "the fine of \$250.00 was paid immediately upon the imposition" of the original sentence (Pet. 4). It would seem unquestionable, therefore, that the fine was paid before any "actual" commitment and that, in consequence, the prison sentence was suspended without any service. (See R. 8.) There is nothing in the record to show, and petitioner does not assert, that he was ever delivered to a jail or penitentiary for service of his sentence—the time when, under 18 U. S. C. 709a, he would actually commence service of his prison sentence.



that this partial execution "freezes" the sentence, with the result that an increase in the prison part of the sentence, upon revocation of probation, constitutes double punishment. He points out that unless such an interpretation be given the statute the court, under the language permitting, upon revocation of probation, the imposition of "any sentence which might originally have been imposed," would have been authorized to require him to suffer the maximum punishment of fine and imprisonment allowed by the penal statute plus the \$250 fine which he had already paid (Pet. 12-13).

Petitioner's argument is based on the traditional concept that a judgment imposing both fine and imprisonment constitutes a single judgment and that no increase in the punishment prescribed by such a judgment may be made after it has been partially executed. This concept must, however, be discarded so far as the Probation Act is concerned because of the distinctive treatment accorded fines and imprisonment therein to accomplish the aims of that statute. In permitting suspension of the imposition or execution of sentence and the placing of a defendant

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<sup>3</sup> The generality of the language of the dissenting opinion would seem conditioned by the observation that "the fine was paid." (See second complete paragraph on R. 23.)

<sup>4</sup> He also contends that it would not be permissible for the Government to argue that the court would have been restricted to the imposition of the maximum fine minus the \$250 already paid because of the sweep of the statutory authorization (Pet. 13).

upon probation, "The great desideratum" of the probation statute "was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals \* \* \*."

*United States v. Murray*, 275 U. S. 347, 357.<sup>5</sup>

While the paramount aim was that "the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict"

(*United States v. Murray, supra*, at p. 357), the

statute reserves sufficient power to the court to award some punishment for the offense by way

of a fine at the same time that the court is suspending the imposition or execution of a prison

sentence. Section 1 provides specifically that

"the court may impose a fine and may *also* place the defendant upon probation *in the manner aforesaid*" [italics supplied].<sup>6</sup> Thus, while the

<sup>5</sup> We do not mean to say, of course, that the grant of power to place on probation is not sufficiently broad to permit probation on one indictment or count and imprisonment on another indictment or count. *Frad v. Kelly*, 302 U. S. 312; *Cosman v. United States*, 303 U. S. 617; see also *Burns v. United States*, 287 U. S. 216.

<sup>6</sup> The italicized words relate, of course, to the preceding language permitting the court to place the defendant on probation after suspending the imposition or execution of sentence, and as here used can mean only that the court, while relieving the defendant from a prison sentence by granting probation, may also impose a fine.

court, for a single offense, may not require the defendant to serve any period of imprisonment when granting probation (*United States v. Murray, supra*), it may require him to pay a fine either as a prerequisite to the granting of probation or independently thereof. *Reeves v. United States*, 35 F. (2d) 323, 326 (C. C. A. 8); *Hollandsworth v. United States*, 34 F. (2d) 423, 426 (C. C. A. 4); *Archer v. Snook*, 10 F. (2d) 567, 569 (N. D. Ga.).<sup>7</sup>

It is evident, therefore, that a sentence such as that imposed upon petitioner when probation was granted must be considered for the purposes of the Probation Act as, in essence, two separate and distinct sentences—one imposing a fine and the other dealing with the matter of imprisonment. In this light it must be apparent that no problem of double punishment arises because of the three-year sentence imposed upon petitioner upon revocation of probation. The payment of the fine had relation only to the “separate” and “distinct” sentence which imposed it, and the court did not attempt to increase the fine.<sup>8</sup> The “separate” and

<sup>7</sup> The fine thus imposed may be made payable in one sum before probation is granted or the court, under Section 1 (*supra*, p. 3), may permit its payment in one or several sums during the period of probation.

<sup>8</sup> The Government is consequently not required in this case, as petitioner seems to think, to sponsor any interpretation of the Probation Act which would permit a court, upon revoca-

"distinct" two-year imprisonment sentence had not, in any sense, been "partially executed,"<sup>9</sup> and there was hence no constitutional obstacle to the increasing of that sentence to three years<sup>10</sup> under the statutory permission to "impose any sentence which might originally have been imposed." (Section 2, *supra*, p. 4.) The payment of the fine in the instant case does not, therefore, serve to differentiate the case in principle from the *Moore* and *Reimer* cases, *supra*, where no fine was involved but prison sentences which had not been executed in whole or in part were increased upon revocation of probation.

Petitioner cites no case which makes against the view that Congress may ~~not~~ validly treat a fine and imprisonment on a different basis for the purpose of probation, and no plausible reason suggests itself why this may not be done. *Ex parte Lange*, 18 Wall. 163, cited by petitioner, is clearly inapposite since there a permitted alternative penalty was fully satisfied.

tion of probation, to increase a fine which has already been paid.

<sup>9</sup> Indeed, as it specifically provided, the two-year imprisonment sentence was, by direction of the District Court, "suspended"; i. e., it was not to be executed.

<sup>10</sup> The maximum term of imprisonment to which petitioner could have been sentenced for each of the two offenses to which he plead guilty was ten years (48 U. S. C. 409).

## CONCLUSION

The case presents no constitutional problem. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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